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OCTOBER TERM, 1979

No. 79-1920

In re Beef Industry Antitrust Litigation,
M.D.L. Docket No. 248

SAFEWAY STORES, INC., ET AL,
Petitioners,

versus

MEAT PRICE INVESTIGATORS ASSOCIATION, ET AL,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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The following cases were consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation as *In re Beef Industry Antitrust Litigation* (Supermarkets) and transferred to the Honorable William M. Taylor, Jr., Judge of the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. §1407, and they were consolidated for the purposes of appeal to the United States Court of Appeals for the Fifth Circuit:

PONY CREEK CATTLE CO., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., et al.,
Plaintiffs-Intervenors-Appellants,

versus

THE GREAT ATLANTIC & PACIFIC TEA CO., et al.,
Defendants-Appellees.

No. CA 3-75-0702-C (N.D. Tex. June 5, 1975)

R. DIRK AGEE, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1237-C (N.D. Tex. September 7, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1238-C (N.D. Tex. September 7, 1976)

RICHARD S. LOWE, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1244-C (N.D. Tex. September 7, 1976)

A. I. BLACK, et al.,
Plaintiffs-Appellants,

versus

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1248-C (N.D. Tex. September 7, 1976)

CHAPPARAL CATTLE CORP., et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1253-C (N.D. Tex. September 7, 1976)

BURKE PETERSEN, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1254-C (N.D. Tex. September 7, 1976)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1361 (N.D. Tex. September 7, 1976)

JOHN O. VARIAN, et al.,
Plaintiffs-Appellants,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1470-C (N.D. Tex. November 8, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0361 (N.D. Tex. March 16, 1977)

LITTLE RANCH CO., et al.,
Plaintiffs-Appellants,

versus

THE NATIONAL ASSOCIATION OF FOOD CHAINS, et al.,
Defendants-Appellees.

No. CA 3-77-0362-C (N.D. Tex. March 16, 1977)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

versus

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0360 (N.D. Tex. March 16, 1977)

INDEX

Page

TABLE OF AUTHORITIES vi

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

INTRODUCTION 4

STATEMENT OF THE CASE 5

REASONS FOR DENYING THE WRIT 7

I. IS THE "PASS-ON" THEORY APPROPRIATE ONLY TO PRICE-FIXING AS ESPOUSED BY THIS COURT IN *HANOVER SHOE* AND *ILLINOIS BRICK* INAPPOSITE TO PLAINTIFFS'-RESPONDENTS' SITUATION ALLEGING UNLAWFUL MONOPSONISTIC AND OLIGOPSONISTIC PRACTICES OF THE BEEF INDUSTRY BY DEFENDANTS-PETITIONERS 7

II. IF APPLICABLE AT ALL, THE DECISION BELOW IS AN UNEQUIVOCALLY CONSISTENT INTERPRETATION OF THE "PASS-ON" THEORY ESPOUSED IN THIS COURT'S DECISIONS IN *HANOVER SHOE* AND *ILLINOIS BRICK* 14

INDEX (Continued)

Page

III. THE DECISION BELOW IS IN CONFORMITY WITH HOLDINGS OF OTHER CIRCUITS AND OF DISTRICT COURTS 16

CONCLUSION 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases:

Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) 13

Dart Drug Corp. v. Corning Glass Works, 480 F.Supp. 1091 (D.C. Md. 1979) 12

Fontana Aviation, Inc. v. Cessna Aircraft Company, No. 79-1863 (7th Cir. Opinion filed March 19, 1980) 12

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) ..... *passim*

Illinois Brick Co. v. Illinois, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977 ..... *passim*

In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979) 6,9

In re Japanese Electronic Products Antitrust Litigation, M.D.L. No. 189 (E.D.Pa. Opinion filed May 5, 1980) 12

TABLE OF AUTHORITIES (Continued)

Page

In re Uranium Antitrust Litigation, 473 F.Supp. 393 (N.D.Ill. 1979) 13

Midwest Paper Products v. Continental Group, Inc., 596 F.2d 573, 585 n. 47 (3rd Cir. 1979) 10,12,14,16,17

Obron v. Union Camp Corp., 355 F.Supp. 902 (E.D.Mich. 1972) *aff'd* 477 F.2d 542 (6th Cir. 1973) 18

Phillips v. Crown Central Petroleum Corp., 602 F.2d 616 (4th Cir. 1979) *cert. denied*, ____ U.S. ____, 100 S.Ct. 1021 (1980) 17

United States v. Patten, 226 U.S. 525 (1912) 7

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 8

Statutes:

15 U.S.C. §1 3,5

15 U.S.C. §2 3,5

15 U.S.C. §15 4,5,14,15

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

The undersigned Plaintiffs-Respondents respectfully request this Court to deny this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit as filed by Peti-

tioners, Safeway Stores, Inc., et al. and grant only Respondents', A. L. Black, et al., Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 79-2060.

QUESTIONS PRESENTED

I. IS THE "PASS-ON" THEORY APPROPRIATE ONLY TO PRICE-FIXING AS ESPOUSED BY THIS COURT IN *HANOVER SHOE* AND *ILLINOIS BRICK* INAPPOSITE TO PLAINTIFFS'-RESPONDENTS' SITUATION ALLEGING UNLAWFUL MONOPSONISTIC AND OLIGOPSONISTIC PRACTICES OF THE BEEF INDUSTRY BY DEFENDANTS-PETITIONERS.

II. IF APPLICABLE AT ALL, *ILLINOIS BRICK CO. V. ILLINOIS*, 431 U.S. 720, *REHEARING DENIED*, 434 U.S. 881 (1977), PRESCRIBES ANTITRUST ACTION BROUGHT BY INDIRECT PURCHASERS EXCEPT IN TWO ADEQUATELY DEFINED AREAS 1) WHERE POTENTIAL PLAINTIFFS STATE CAUSES OF ACTION WHICH ARE FUNCTIONAL EQUIVALENTS TO A "COST-PLUS" CONTRACT AND 2) WHERE THE POTENTIAL DEFENDANT OWNS OR CONTROLS THE INTERVENING LINK IN THE CHAIN OF DISTRIBUTION WHICH "PASSED-ON" THE ALLEGED ILLEGAL OVERCHARGE. THE

QUESTION PRESENTED BY PETITIONERS IN THIS WRIT OF CERTIORARI IS WHETHER THIS COURT NEED REVIEW A DETERMINATION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FINDING PLAINTIFFS'-RESPONDENTS' ALLEGATIONS ARE A FUNCTIONAL EQUIVALENT TO A "COST-PLUS" CONTRACT.

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 15 U.S.C. §15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

INTRODUCTION

Plaintiffs-Respondents to this Petition for Writ of Certiorari by Petitioners, Safeway Stores, Inc., et al, have filed on June 27, 1980, their own Petition for Writ of Certiorari, No. 79-2060, styled *In re Beef Industry Antitrust Litigation*, M.D.L. Docket No. 248, A. L. Black v. Albertson's Inc. Respondents in the matter at hand petitioned for that writ based on the theory that *Hanover Shoe* and *Illinois Brick* are inapposite to the monopsonistic and oligopsonistic practices of the Petitioners here. Accordingly, this Court should find that *Hanover Shoe* and *Illinois Brick* do not apply, foregoing the need to address the issue raised by these Petitioners, Safeway Stores, Inc., et al., in this Petition.

Assuming *arguendo* applicability of the prescriptive and restrictive uses of the "pass-on" theory dictated by *Hanover Shoe* and *Illinois Brick* to the case at bar, Respondents here advocate in the alternative that the decision

below clearly and unmistakably found that Plaintiffs' complaints sufficiently allege situations which fall within the "cost-plus" exception to *Illinois Brick*.

Respondents here reserve the right to plead this cause in the alternative in this Petition without losing their right to plead the irrelevancy and inapplicability of *Hanover Shoe* and *Illinois Brick*.

STATEMENT OF THE CASE

This is an antitrust action brought by Plaintiffs-Respondents as fat cattle producers-sellers against Defendant-Petitioner supermarket chains and the supermarkets' trade association, for violation of §§1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2, seeking injunctive relief and treble damages for injury to Plaintiffs-Respondents' businesses and properties, 15 U.S.C. §15, 26. Such damages were the direct and proximate result of the Defendants'-Petitioners' unlawful conspiratorial actions to monopolize the beef industry resulting in the fixing and artificially depressing of the prices of fat cattle. Defendants'-Petitioners' monopsonistic and oligopsonistic practices, which violated the federal antitrust laws, deprived Plaintiffs-Respondents of a fair and reasonable price properly based upon the natural interaction of supply and demand in a free market system, a price which would have existed but for the anticompetitive, unlawful acts of the Defendants-Petitioners as alleged.

The Plaintiffs-Respondents filed this action on December 30, 1975, in the United States District Court for the Northern District of Texas, Amarillo Division. The Plaintiffs are individual and corporate cattle feeders, seven in number, all residents of Texas. They are engaged in the business of producing fattened cattle to be sold when ready for slaughter. The action originally named seventeen chain store defendants in the National Association of Food Chains. Settlements were made with four Defendants, leaving thirteen in the case. Defendants-Petitioners filed a Motion to Dismiss and for Judgment on the Pleadings under Rule 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure on June 17, 1977, predicated on the then recent decision of *Illinois Brick Co. v. Illinois, supra.*

The Trial Court entered its Order of Dismissal on the Rule 12(b) Motion, basing its reasoning on the holding of *Illinois Brick Co. v. Illinois, supra.* The District Court's Final Order, after Plaintiffs-Respondents had duly tendered amendments to their complaints, was entered December 9, 1977, dismissing with prejudice.

The Plaintiffs-Respondents duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit. On August 17, 1979, that Court entered judgment, reversing and remanding all the consolidated appealed cases to the United States District Court for the Northern District of Texas for further proceedings. *In Re Beef Antitrust Industry Litigation,* 600 F.2d 1148 (5th Cir. 1979). The mandate was stayed until July 9,

1980. The judgment agreed with the District Court that *Illinois Brick* applies to an indirect producer-seller, but held that a producer-seller forced to sell in a rigged market could maintain his civil antitrust action on a "functional equivalent" to a "cost-plus exception" to *Illinois Brick*.

REASONS FOR DENYING THE WRIT

I. This Case Should Be Reviewed By This Court, But Only Because The "Pass-On" Theory Espoused By This Court In *Hanover Shoe* And *Illinois Brick* Are Inapposite To The Monopsonistic And Oligopsonistic Practices Of Defendants-Petitioners.

This Court has recognized the seriousness of monopsony or oligopsony at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire market place is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal cur-

> rent of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." *Id.* at 542. (emphasis added)

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221.

Therefore, to violate the antitrust laws in this key position is not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick, supra*, but is instead an injury which permeates the entire market place, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221. In the present case, Plaintiffs have alleged that Defendants have conspired together to restrain trade in the entire market for the production, slaughter and purchase of beef. Defendants have chosen as their tool, for the manipulation of this market, the price they have agreed to pay for fresh frozen processed beef. Defendants, who existed in the key position of the market place, were therefore able to manipulate and rig

the entire market place by their conspiracy, a market into which Plaintiffs were forced to sell their live cattle which are a perishable commodity and in the short-term inelastic.

The Fifth Circuit, in the opinion below, stated:

> "The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated more broadly, is that the activities of the alleged price-fixing conspiracy depressed the wholesale prices generally . . ." *In Re: Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979)

Thus, the gravaman of Plaintiffs' complaints is that Plaintiffs are damaged, by the artificially depressed prices in the market into which they are compelled to sell a perishable fungible product.

The Fifth Circuit refused to recognize the distinction between a monopsony or an oligopsony which violates the antitrust laws in a dominant position of an industry's production chain, and that which was addressed by this Court in the *Illinois Brick* decision, where an overcharge was passed through several levels of distribution finally arriving at the ultimate consumer having been distorted by each level of distribution. The case presently before this Court is clearly not an "overcharge" case, but a case in which the Defendants chose price as their tool to manipulate an entire market in

which Plaintiffs participated, and in which Plaintiffs were damaged. Simply because the Defendants chose to use pricing as their tool does not mean that *Illinois Brick* is instantaneously invoked.

In interpreting *Illinois Brick*, the Third Circuit stated:

> "A different problem is presented where prices are fixed below the competitive market price or where Defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since Defendants' benefits in those instances are not so readily ascertainable and may not be sufficient to compensate 'those individuals whose protection is the primary purpose of the antitrust laws.' In such circumstances Courts have awarded damages based upon the amount of injury suffered by Plaintiffs rather than the benefits derived by the Defendants." *Midwest Paper Products v. Continental Group, Inc.*, 596 F.2d 573, 585 n. 47 (3rd Cir. 1979).

Here, such a "different problem" is presented in that Defendants used their position of dominance in the middle of the production chain of the market place in order to fix prices below competitive market prices, and thus effectively control the entire market place. Plaintiffs are simply seeking to recover those damages they have sustained because of such interference with the

free play of market forces, rather than trying to recoup any of the benefits which may have been derived by the Defendants.

The Fifth Circuit's Opinion below, states that this Court's decision in *Illinois Brick* is to have "general applications", including those cases in which price is used in order to monopolize a market in violation of Section 2 of the Sherman Act.

Surely this Court did not overrule *ub silentio* ninety years of antitrust law in practice in *Illinois Brick* nor did it intend for *Illinois Brick* to be applied to all Section 1 and 2 cases, regardless of their form, whenever pricing was involved. To hold thus, would be contrary to the prior rulings of this Court, the legislative intent of the Sherman and Clayton Acts, and discourage the enforcement of the antitrust laws which is contrary to this Court's holding in *Hanover Shoe v. United Shoe Machine Corp.*, 392 U.S. 481 (1968).

Since the announcement of the decision in *Illinois Brick* in 1977, the various courts throughout the United States have been groping with the decision in the context of ennumerable motions for summary judgment and motions under Rule 12(b) for dismissal for failure to state a cause of action.

The Third Circuit has held that they will apply *Illinois Brick* only in an overcharge situation, in which the illegal overcharge is passed through a chain of dis-

tribution. *Midwest Paper, supra.* This line of thinking has been followed by other Courts within that circuit, *Dart Drug Corp. v. Corning Glass Works,* 480 F.Supp. 1091 (D.C. Md. 1979), and in *In re Japanese Electronic Products Antitrust Litigation,* M.D.L. No. 189 (E.D. Pa. Opinion filed May 5, 1980). Both of these cases base their opinions, in large part, on Note 47 of *Midwest Paper Products, supra.* In *Dart Drug Corp.,* the Court states:

> "The foregoing review of the rationale of *Illinois Brick* makes it abundantly clear that the case bars suit *only* in those situations where Plaintiff's injury is premised on an 'overcharge' in where, in order to prove that injury, Plaintiff must also demonstrate that persons in the chain of distribution between Plaintiff and the antitrust violator passed on the overcharge to Plaintiff." *Dart Drug Corp.,* 480 F.Supp. at 1101. (emphasis added)

In *In re Japanese Electronic Products Antitrust Litigation, supra,* the Court declines to apply *Illinois Brick* where, "the amount of injury suffered by the Plaintiff rather than the benefits derived by the Defendants. . ." are the measure of damages, again citing Note 47 of *Midwest Paper Products.*

The Seventh Circuit in the case of *Fontana Aviation, Inc. v. Cessna Aircraft Company,* No. 79-1863 (7th Cir. Opinion filed March 19, 1980), refused to apply *Illinois Brick* where the defendant's pricing policy was alleged

to be part of a "multi-faceted conspiracy" causing competitive injury to the plaintiff. Here again, the plaintiff was suing for the damage he suffered by reason of the violation, rather than the disgorgemount of illegally obtained profits by the defendant. The plaintiff was only seeking to recover the amount of injury he had suffered as a proximate cause of the violation. *See, Chattanooga Foundry and Pipe Works v. City of Atlanta,* 203 U.S. 390 (1906).

In *In re Uranium Antitrust Litigation,* 473 F.Supp. 393 (N.D. Ill. 1979), the District Court again focuses on how Plaintiff was injured in determining whether or not to apply *Illinois Brick.* There the Court stated:

> "Counterclaimants fit within the class of '. . . those that have been injured by [alleged] restraints imposed by Defendant on competitive forces in the economy.' " *Id.* at 403.

The Fifth Circuit, although recognizing that Plaintiff's claim of damage to the market, and that Plaintiff's complaint further alleges that "(3) [Plaintiffs] sold their livestock for less than they would have in an open and competitive market", held that *Illinois Brick* was of such general application, that it applied to a case where the market was allegedly manipulated by use of price, and where the Defendants monopolized and attempted to monopolize said market by use of price. The Fifth Circuit's tortuous reasoning finally arrives at a point wherein they will allow Plaintiffs to continue their law-

suit, applying *Illinois Brick*, involving the "cost-plus" contract exception.

The Fifth Circuit further stated that it saw nothing "special about monopsony or oligopsony price fixing cases that justifies treating them [differently] from monopoly price-fixing cases . . ." . This statement is clearly at odds with the Third Circuit's opinion in *Midwest Paper* where it recognizes a difference between an undercharge and overcharge case. *Midwest Paper*, 596 F.2d at 585, n. 47.

Unless this Court addresses the issues raised in this case (especially in light of the Fifth Circuit's prophalactic application of *Illinois Brick*), there is a serious likelihood that there will be further divergence of the already multiple points of view regarding the scope and application of *Illinois Brick* within the Circuits, to the end that there will be non-uniform application of the antitrust laws within the United States.

II. If Applicable At All, The Decision Below Is An Unequivocally Consistent Interpretation Of The "Pass-On" Theory Espoused In This Court's Decisions in *Hanover Shoe* And *Illinois Brick*.

This Court has established definite guidelines for the handling of claims under the antitrust laws involving Section 4 of the Clayton Act, 15 U.S.C. §15: "Pass-on" claims or defenses are permitted in two well-defined

areas involving potential plaintiffs — causes of actions which state functional equivalents to a "cost-plus" contract and claims where the potential defendant owns or controls the intervening link in the chain of distribution which "passed-on" the alleged overcharge. *Illinois Brick, supra; Hanover Shoe Machinery Corp.*, 392 U.S. 481 (1968).

The Court's pronouncements in *Hanover Shoe* and *Illinois Brick* applied a uniform approach to the "passing-on" of an illegal overcharge from the illegal price-fixer through an intermediary to the ultimate consumer. *Hanover Shoe* refused to allow the "passing-on" of the illegal overcharge to the consumer as a defense attempting to show plaintiff incurred no damage under Section 4 of the Clayton Act, 15 U.S.C. §15; *Illinois Brick* prescribed plaintiffs' claim that the illegal overcharge was fully "passed-on" by the intermediary, causing plaintiff's damage under Section 4 of the Clayton Act. Policy reasons dictated such a response. Avoidance of multiple liability and duplicative recovery as well as the intricacies of economic analysis of numerous market factors necessitated the holdings of this Court. *Illinois Brick Co. v. Illinois*, 431 U.S. at 731-732, 738-741.

However, the Court emphatically stated that there are two situations in which the tracing of the illegal overcharge through this distribution chain is both easily and readily ascertainable: 1) the "cost-plus" contract exception and 2) the owned or controlled theory. *See, Illinois Brick Co. v. Illinois*, 431 U.S. at 736; *Hanover Shoe, Inc. v. United States Machinery Corp.*, 392 U.S. at 494.

In both instances, the policy grounds requiring strict application barring claims by remote purchasers dissipates, giving rise to easy proof of damages. Duplicative recoveries are avoided by use of evidence not susceptible to differing economic interpretation while economic intricacies are avoided by readily traceable evidence of the overcharge.

Undeniably, if application of *Hanover Shoe* and *Illinois Brick* are applicable, the Fifth Circuit was correct in finding that the Plaintiffs' allegations in their complaints were functional equivalents of the "cost-plus" contract exception. Each complaint sufficiently alleged on its face that from the price tendered by the food chains-defendants to the slaughterers and packers is subtracted a pre-determined amount derived from a consistent formula — a reverse "cost-plus" contract. Such contracts become pre-existing due to slaughterers and packers procuring Defendants' weekly requirements prior to their purchases from the Plaintiffs. Accordingly, the opinion of the Court below is a consistent interpretation of the principals espoused in this Court's decisions in *Hanover Shoe* and *Illinois Brick*.

III. The Decision Below Is In Conformity With Holdings Of Other Circuits And Of District Courts.

The Petitioners erroneously find fault through inconsistency with the decisions rendered in *Midwest Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573

(3rd Cir. 1979) and *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979) *cert. denied*, ____U.S. ____, 100 S.Ct. 1021 (1980). Petitioners correctly state the holdings of each case, but fail to explain their respective rationale.

The Third Circuit in *Midwest Paper, supra*, denied indirect purchasers of consumer bags the right to maintain treble damage actions unless it could be found that there was pre-existing, fixed quantity, cost-plus contracts. 596 F.2d at 578. On the basis of documents before it, the Court could not find evidence that such contracts existed. Evidence did support a finding of "informal oral arrangements;" *Id.* at 580. Such arrangements were not reduced to formal contracts for a fixed quantity as alleged by the Plaintiffs-Respondents. The Third Circuit merely refused to find what the Fifth Circuit in the opinion below could not deny — a finding of a pre-existing "cost-plus" contract.

The Fourth Circuit failed to find a "cost-plus" exception to *Illinois Brick* where gasoline wholesalers attempted to assert a defensive "pass-on" theory to plaintiff-retailers allegation of conspiracy to fix wholesale prices. Again, the "cost-plus" exception was not applied due to the Court's finding that "no cost-plus arrangement insured that this immutable ratio would apply even in the absence of a conspiracy. Indeed, a free market surely would and did disrupt it." The Court was unwilling to expand the established requirements of *Hanover Shoe* which the Fifth Circuit found present in the case at hand.

The Sixth Circuit affirmed a District Court's finding of allowing use of the "cost-plus" exception as a defense in a claim where the plaintiff, distributor of mesh window bags, charged its customers the price affixed by the defendant plus a fixed 5%. *Obron v. Union Camp Corp.*, 355 F.Supp. 902 (E.D.Mich. 1972) *aff'd* 477 F.2d 542 (6th Cir. 1973). Finding that the Court in *Hanover Shoe* did not scrap the use of "passing-on" but rather restricted its application, the District Court held that if this was not a "pre-existing" "cost-plus" contract, it was "so strikingly similar to such a contract as to dictate the allowance on the 'passing-on' defense." 355 F.Supp. at 906. The case at hand is analytically akin to *Obron*, in that the slaughterers and packers secured orders from the Defendant food chains to fill their weekly requirements prior to negotiating with Plaintiffs, making bids based on those order prices minus a pre-determined, consistently applied pricing formula.

The holdings of these Courts were based not on a restrictive interpretation of *Hanover Shoe* and *Illinois Brick*, but rather focused on a failure of proof to sustain an application of the "cost-plus" exception. The Fifth Circuit in the opinion below found enough support to determine that the complaints as alleged sufficiently stated a cause of action within the "cost-plus" contract exception. The Circuits therefore have not addressed efforts, and consequently could not reject efforts, to expand the "cost-plus" contract rationale in an attempt to authorize other types of "pass-on" situations. Rather, the Third and Fourth Circuits have not been

satisfied that plaintiffs sufficiently supported their claims to justify invocation of the "cost-plus" contract exception while the Sixth Circuit gave due deference to this Court's opinions.

CONCLUSION

The situation presented by the Plaintiffs-Respondents emphatically falls outside the scope of this Court's rulings in *Hanover Shoe* and *Illinois Brick*. Assuming *arguendo* that this Court's decision in those cases are applicable, the Fifth Circuit's decision applying to "cost-plus" exception is undisputably well found. For these reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, Respondents respectfully request that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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DATED: July 9, 1980

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, No. 79-1920, upon all Plaintiffs' Counsel of record and Defendants' Counsel of record in these proceedings contained within the most recent Liaison Counsel and attorneys list.

Respectfully submitted,

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